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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3817 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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JAYANTILAL GANPATLAL PRAJAPATI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 3817 of 2001

MR HR PRAJAPATI for Petitioner No. 1

GOVERNMENT PLEADER for Respondent No. 1-3

MS PJ DAVAWALA for Respondent No. 4

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 09/08/2001

ORAL JUDGEMENT

#. Heard Mr.H.R.Prajapati, learned advocate appearing on behalf of the petitioner and Mr.H.L.Jani, learned AGP on behalf of the respondent Nos.1 to 3 and Mrs.P.J. Dawawala, learned advocate appearing on behalf of the

respondent No.4.

#. In the present petition, the order of detention dated 11th May, 2001 is challenged by the petitioner under Article 226 of the Constitution of India. The order of detention has been passed by the District Magistrate, Ahmedabad under Section 3[2] of the PBM Act. The present petitioner has been detained at Bharuch Jail as Class II detenu. The grounds of the detention are communicated and supplied to the petitioner as provided under Section 8[1] of the Act. The respondent - State has filed affidavit in reply and the detaining authority has also filed and the the respondent No.4 has also filed two affidavit in reply dated 22nd June, 2001 and the second affidavit is without date. Learned advocate Mr.H.R.Prajapati has challenged the detention order on various grounds but according to him, one or two contentions are enough to vitiate the order of detention. A specific contention has been raised by the petitioner in ground [g] to the effect that the representation dated 22nd May, 2001 sent by the petitioner by registered post addressed to the Hon'ble Minister, Government of India, Ministry of Consumer Affairs Department which has been received by the concerned Minister but despite this, the representation remained pending with the respondent No.4 and the same was not considered in time. Thus, there was a delay in considering the representation dated 21st May, 2001 and therefore, legal right of the present petitioner of making an effective representation under Article 22[5] of the Constitution has been violated. In short the submission of Mr.Prajapati is that the representation dated 22nd May, 2001 addressed to the Hon'ble Minister of the concerned Department which has been received by the concerned Minister on 28th May, 2001 remained pending upto 18th June, 2001 and thereafter the representation of the petitioner has been rejected by the respondent No.4 on 26th June, 2001 and the same has been communicated to the petitioner on 27th June, 2001. Therefore, there is no explanation of the respondent No.4 for the period from receiving the representation dated 28th May, 2001 upto 18th June, 2001. Therefore, not to decide the representation in time which adversely affected the legal right and violated the mandatory provisions of Article 22[5] of the Constitution of India. Learned advocate Mr.H.R.Prajapati has also relied upon decisions of the Apex Court reported in 1993 [Suupl] [2] SCC 341, 1995 [2] GLR 1596 and one more unreported decision of this Court in Special Civil Application No. 4082 / 2000 dated 29th June, 2000 [Coram : Mr.Justice R.P.Dholakiya, J.].

#. Learned AGP Mr.H.L.Jani, appearing on behalf of the

respondents has submitted that looking to the facts and circumstances as also the materials on record, the order of detention has been rightly passed by the detaining authority. There were compelling circumstances and there was no other option except to pass the detention order, otherwise, the activities which were carried out by the petitioner, could have adversely affected the public, therefore, according to him, the order of detention is legal and valid and in such circumstances, no interference is required by this Court.

#. Learned advocate Mrs.P.J.Dawawala appearing on behalf of the respondent No.4 vehemently submitted that the representation dated 22nd May, 2001 received by the department on 28th May, 2001 which was in Gujarati and therefore, since no facility of translation in the Department, the concerned department has received the representation on 18th June, 2001 which was sent to the State Government for translation and after receiving translation from the State Government immediately on next date i.e. on 26th June, 2001, the representation of the petitioner has been rejected by the respondent No.4. She also submitted that the petitioner has deliberately sent the representation to the Hon'ble Minister though in the grounds of detention, specific name of the Additional Secretary has been mentioned for sending the representation. Therefore, when the petitioner had not sent the representation to the proper authority, in that case, the petitioner is not entitled to raise contention of delay. She further submitted that a detailed explanation has been given by the respondent No.4 explaining the delay and as to how the representation travelled and remained pending with the respondent No.4. Therefore, looking to this fact, there is no delay in deciding the representation by the respondent No.4 and hence, the order of detention cannot be vitiated on this ground. She relied upon para-4 of the first affidavit in reply and para-3 of the second affidavit which has been filed by the respondent No.4.

#. I have considered submissions of learned advocates for the parties. In the present case, the facts are not in dispute between the parties. The representation dated 22nd May, 2001 submitted by the petitioner, received by the respondent No.4 on 28th May, 2001 and ultimately the representation has been located on 18th June, 2001 which was sent to the State Government for translation and the State Government has forwarded the representation with translation to the Central Government which received by the Central Government on 15th June, 2001 and the Central Government has rejected the representation on 26th June,

2001 and accordingly communicated to the petitioner on 27th June, 2001. Therefore, according to the learned advocate Mrs.P.J.Dawawala, there is sufficient explanation given by the respondent No.4 why the representation has remained pending upto 26th June, 2001 with the respondent No.4. It is necessary to note that submission which has been advanced by the learned advocate Mrs.P.J.Dawawala to the effect that in the grounds of detention, specific names and addresses of the authority have been provided to whom the representation to be addressed. But despite this, the representation has been sent to the Hon'ble Minister of the concerned department is a deliberate attempt on the part of the petitioner for raising contention of delay and therefore, such contention cannot be accepted. Submission of Mrs.Dawawala cannot be accepted because the Hon'ble Minister is also concerned authority who can decide the representation submitted by the petitioner because afterall Additional Secretary has to take decision with consultations of the Hon'ble Minister. Thus, the Hon'ble Minister of the concerned Department is necessary party who can take decision on the representation of the petitioner. Therefore, if the representation has been sent to the Minister directly instead of to the concerned authority of the department, cannot be considered to be a deliberate attempt on the part of the petitioner. However, it is also necessary to note that the representation has been received by the Central Government on 28th May, 2001 remained pending with the Central Government upto 28th June, 2001 which was forwarded to the State Government for translation and the State Government which received the same on 25thJune, 2001. But there is no explanation in the reply for the period from 28th May, 2001 upto 18th June, 2001. The representation remained unattended by the respondent No.4. Merely the representation was sent to the Minister cannot be considered to be a deliberate attempt on the part of the petitioner. In fact, the concerned Minister is also equally responsible and duty bound being the Head of the Department to consider the representation of the petitioner because he is also party to take decision on the representation. In such similar cases, the Apex Court has considered in case of RUMANA BEGAM VS. STATE OF ANDHRA PRADESH reported in 1993 [Suppl] [2] SCC 341. The relevant Head Notes are quoted as under:

"Prevention detention - representation - For revocation of detention order, made to the Governor instead of to Chief Secretary to the State Government - Delay of 174 days in transmitting the representation to State Govt.

and of above 6 months in its disposal from the date of representation - delay explained on grounds that representation deliberately made to the Governor, knowing well that it had to be addressed to the Chief Secretary, with a view to create a ground for delay and that it was a mere non statutory representation in view of earlier representations made by detenu which were expeditiously disposed of - Held, explanation untenable - representation made to Governor must be treated to have been made to the State Govt. Earlier representation being not in respect of validity of detention order or revocation thereof, the representation made to the Governor for revocation of detention order was the first representation of its kind. Unexplained and unreasonable delay in disposal of that representation vitiated the detention - COFEPOSA ACT, 1974."

#. Similar decision of the Division Bench of this Court in case of KANJIBHAI HARJIBHAI RABARI VS. STATE OF GUJARAT reported in 1995 [2] GLR 1596, the following observations made in para-5 and 6 are as under :-

"5. When the aforesaid acknowledgment along with the postal receipt of registering the same was pointed out to the learned A.P.P. Mr.S.R. Divetia, has raised a contention that the representation is to be made to the State Government under Section 9 of the PASA Act. It can also be made under Section 15 of the said Act to the State Government. He says that in the grounds of detention order also it was specifically mentioned as to whom the representation should be made by a separate annexure. So far as representation to the State Government is concerned, it was addressed to "Deputy Secretary, Home Department [Special-3], Gujarat Government, Secretariat, Gandhinagar.". When it was not sent to the said authority it cannot be said a representation to the State Government. it is rather very technical argument advanced by Mr.S.R. Divetia. It may be pointed out that aforesaid requirement pointing out to whom the representation can be made was introduced in view of the interpretation by the Supreme Court of the provision of Article 22[5] of the Constitution of India. When there is a preventive detention earliest opportunity to make

a representation should be afforded and when the detenu does not know to whom the representation to be made or where to be made, it was necessary to give such details and accordingly they are given. That does not mean that the Chief Minister or the Home Minister who, under the Rules of the Business of the Government, are authorised to exercise powers of the State Government cannot decide the representation. it is true that for the purpose of facility of sending the same the address of the Deputy Secretary is given. That does not mean that the Deputy Secretary robs away the power of the Chief Minister or the Home Minister or the authority who is under the Rules of Business entitled to exercise powers. Now so far as the State is concerned, as defined in Section 30 of the General Clauses Act it means Governor of the State. The Governor has also to act as per the advice of the Council and there are also Rules of Business, 1990. Instructions are also published regarding Business of Government issued under Rule 15 of the Gujarat Government Rules of Business, 1990. As per the instruction 4[1][A] which is in Part II except as otherwise provided in the instructions, the cases shall ordinarily be disposed of by or under the authority of the Minister in charge who may be means of standing orders give such directions as he thinks it fit for the disposal of the cases in the Department. There is no dispute on the point that on the date when the aforesaid representation was made on 29th January, 1994. Mr.Chimanbhai Patel, the Hon'ble Chief Minister was holding the portfolio of the Home Department and therefore, he was also the Home Minister. Similar such point was also considered in the Special Criminal Application No.35 of 1993, decided by the Division Bench of this Court consisting of S.D. Shah and S.M.Soni, JJ. In the last portion of para-6 it is observed as under :-

"6. .. .. .. It may be noted at this stage that the Minister is under the Rules of Business the authority competent to decide the representation made by the detenu under the Gujarat Prevention of Anti Social Activities Act, 1985."

6. now, when that is so, the representation which was sent to the Chief Minister with the

name of Chimanbhai who was holding the portfolio of Home Ministry was the State and the same should have been considered. However, the reply is quite strange inasmuch as the Home Department disclaims to have received the same. Before filing the affidavit, really speaking, the concerned officer of the Home Department should have made enquiry as to whether the office of the Chief Minister in Sachivalaya has received any such representation as he was holding the portfolio of Home Minister also particularly when the specific point is raised in para 2 of the petition. Normally, if any such representation is received by the office of the Chief Minister and the concerned Minister is different from the Chief Minister, certainly that may be sent to the department. Herein, in this case though the Chief Minister was holding the portfolio of the Home Department still, however, that office should have sent it to the Home Department. However, if it was not sent to the Home Department, it does not cease to be the representation made by the petitioner to the State Government and it is clear that though it was sent on 24th January, 1994, it has not been considered. In that view of the matter, on this ground alone the petition deserves to be allowed and is accordingly allowed. In view of the fact that the presentation made by the petitioner has not been considered by the State Government, the continued detention has become illegal, hence the respondents are directed to release the petitioner forthwith if no more required in any other case. Accordingly Rule is made absolute."

#. Thereafter, recently in case of RAJMAL VS. STATE OF TAMILNADU reported in AIR 1999 SC 684, relevant observations are as under :-

Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drugs Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders and Slum Grabbers Act [14 of 1982], S-3 Detention Unexplained delay of five days in considering the disposing the detenu's representation - Mere absence of the Minister at Headquarters not sufficient to justify delay - Detention vitiated.

Constitution of India, Art. 22[5]

It is a constitutional obligation of the Government to consider the representation forwarded b the detenu without any delay. Though no period is prescribed by Art.22 of the Constitution for the decision to be taken on the representation the words "as soon as may be " in Cl. (5) of Art.22 convey the message that the representation should be considered and disposed of at the earliest. But that does not mean that the authority is pre-empted from explaining any delay which would have occasioned in the disposal of the representation. The Court can certainly consider whether the delay was occasioned duty to permissible reasons or unavoidable causes. If delay was caused on account of any indifference or lapse in considering the representation such delay will adversely affect further detention of the prisoner. In other words, it is for the authority concerned to explain the delay, if any, in disposing the representation. It is not enough to say that the delay was very short. Even longer delay can as well be explained. So the test is not duration or range of delay, but now it is explained by the authority concerned. Thus, in the present case, the Government which received remarks from different authorities submitted the relevant files before the under Secretary for processing it on the next day. The Under Secretary forwarded it to the Deputy Secretary on the next working day. Thereafter the file was submitted before the Minister who received it while he was on tour. The Minister passed the order after five days and there was no explanation whatsoever as for for the delay which occurred thereafter. Merely stating that the Minister was on tour and hence he could pass orders only after five days is not a justifiable explanation, when the liberty of a citizen guaranteed under Article 21 of the Constitution is involved. Absence of the Minister at the Head Quarters is not sufficient to justify the delay, since the file could be reached the Minister with utmost promptitude in cases involving the vitally important fundamental right of a citizen."

In one unreported decision rendered in Special Civil Application No.4082 / 2000 decided on 29th June, 2000, this Court [Coram : R. P.Dholakia, J.], the relevant observations in para-4 are as under :-

"4. it is true that in the instant case, affidavit clearly shows that though representation has been sent on 21-3-2000, it remained undecided till 10-4-2000. In the matter before the Supreme Court in Rajammal [supra], it appeared that there was a delay of five days. For that also, explanation has been putfoward by the authority that Minister was on tour for a period of two days. Still, Apex Court has stated that delay of five days is a delay. Whereas in the present case, there was a delay of 20 days in considering the representation. It is to be noted that in this case no satisfactory explanation has been put forward by the respondents though opportunities were given. Therefore, case of the present petitioner is on a much better footing to that of the case before the Supreme Court. Addl Central Govt. Standing Counsel has not been able to explain the delay occurred in deciding the representation. As the representation of the petitioner has not been decided by the Central Government., the rights guaranteed under Article 22[5] of the Constitution of India are violated which make the order of detention illegal."

#. In view of above observations made by the Apex Court as well as division bench of this Court so also observations made in unreported decision of this Court as well as looking to the facts of the present case that the representation dated 22nd May, 2001 which is addressed to the Hon'ble Minister of the concerned Department received by the concerned Minister on 28th may, 2001 which remained pending without any decision upto 18th June, 2001 with the Central Government and this delay remained unexplained by the Central Government. The Hon'ble Minister of the concerned Department is also party who can take decision on representation. Therefore, representation which has been submitted and specifically addressed to the Hon'ble Minister cannot be considered to be a deliberate attempt on the part of the petitioner. The Minister is also equally responsible to consider the representation which has been submitted by the petitioner immediately without any delay and the Minister of the concerned Department is also Head of the Department and therefore when there is no explanation for period from 28th May, 2001 upto 18th June, 2001 on the part of the respondent No.4 and merely representation was in Gujarati and the defence that in the office of the respondent NO.4 no one was aware of the Gujarati language, such defence cannot be entertained and accepted simply on the ground

that it was the duty of the respondent No.4 to see that the representation, though it was in Gujarati, was required to be considered immediately and the same ought to have been sent to the concerned department for quick disposal, otherwise, the right guaranteed under Article 22[5] of the Constitution of India is violated. Therefore, according to my opinion, there is delay as well as the representation dated 22nd May, 2001 has remained unattended with the Central Government for a period from 28th May, 2001 upto 18th June, 2001, which adversely affected the legal right of the present petitioner, hence, on this ground, the order of detention requires to be quashed and set aside.

#. In the result, the present petition is allowed. The order of detention dated 8th May, 2001 passed by the District Magistrate, Ahmedabad is hereby quashed and set aside. The present petitioner - detenu - Jayantilal Ganpatlal Prajapati who has been detained at Bharuch District Jail as Class-II detenu is ordered to be released immediately if he is not required in any other case. Rule is made absolute with no order as to costs.

Date : 9-8-2001 [H.K.Rathod, J.]

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